(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners,*

v.

CHESTER BOWLES, Price Administrator.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

ELIOT C. LOVETT,
Counsel for Petitioner.
729 Fifteenth Street, N. W.,
Washington 5, D. C.

September 2, 1944.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

CITATIONS

* Refers to footnotes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners,*

v.

CHESTER BOWLES, Price Administrator, *Respondent.*

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof

---

PETITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Lucius Powers and W. E. Urick respectfully submits to this Honorable Court the following:

A

STATEMENT OF MATTER INVOLVED

This case is based upon a protest filed by petitioners questioning the validity of a regulation issued by the respondent establishing maximum prices for California table grapes in purported pursuance of Section 2 of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. Appx. § 901.

Petitioners are residents of, and their vineyards and distributing points are in, the San Joaquin Valley of California. This producing area covers more than 25,000 square miles. (Record, pages 2-3.)

There are eight major varieties of table grapes regularly shipped from the San Joaquin Valley area. These include Thompsons and Muscats (which were not shipped in 1943 because of restrictions of the War Food Administration), Red Malagas, White Malagas, Ribiers, Tokays, and Emperors. (Rec. p. 3.) There were also relatively heavy shipments of the Almeria and Cornichon varieties. (R. 22.) The industry practice is that these varieties, and other miscellaneous varieties of table grapes, are shipped as "United States Fancy", "United States No. 1", "United States No. 2", and "Unclassified". Many growers have, by special and expensive methods of cultivation, developed highly specialized grades of table grapes which they ship under brand names at premium prices. (R. 3-4.) The harvest extends from late June to early December. (R. 58.)

Petitioner Powers is a grower of several varieties of table grapes including "Emperors" and "Malagas". Under ordinary circumstances Emperors are one of the higher-priced table grapes, while Malagas are a medium-priced variety. Emperors are produced at the rate of three to four tons per acre whereas the same acreage and conditions will produce five to six tons of Malagas. Furthermore, the Emperor season is longer; it costs approximately 25% more to produce them; and there is a higher percentage of weather damage and crop failures. It therefore follows that there must be, and normally are, price differences between the two varieties. (R. 3-4.)

Petitioner Urick is a grower of table grapes the choicest of which he packs and ships under the trade or brand name "Poinsettia"—a name which he has spent large sums of money in popularizing and promoting. Grapes thus sold

command a price far in excess of the average, and they cannot be sold at the over-all average table grape price (now established as the maximum) without severe loss. On the other hand, if petitioner Urick should temporarily discontinue the use of his brand name, or sell a poor quality of grapes thereunder, he would destroy the value of the name. (R. 2, 5.)

The regulation in question is Amendment No. 4 [1] to Maximum Price Regulation No. 426.[2] The amendment, which brought table grapes within the coverage of the primary regulation, was issued August 19, 1943, to be effective August 21, 1943, and established maximum prices for interstate carlot or trucklot sales of California table grapes to all persons other than ultimate consumers. This was done by fixing dollars-and-cents maximum prices f. o. b. shipping point for shipments out of California. (R. 19.) Variations in prices were provided according to the container size and the season, but not according to different grades, varieties, and established brand names. (R. 3-4, 20.) In other words, as aptly stated by the respondent in his answer to the complaint herein, the amendment "established a single price for all California table grapes, without differentiation for varieties, grades or brands, but subject to certain seasonal differentials set forth in said Regulation." (R. 53-54.)

On the effective date (August 21, 1943) of the price regulation the shipping of California table grapes was already in progress [3] and the petitioners had made various commitments concerning the time and terms of sale and delivery of grapes, and arrangements for the purchase of materials

---

[1] 8 F. R. 11,589.

[2] 8 F. R. 9,546.

[3] Prior to the effective date of the regulation, there were 1,475 carlot shipments of California table grapes. (R. 3.) This constituted approximately 8.7% of the total shipments for the entire season. (R. 44.)

and other facilities for the transportation, packing and shipment thereof. (R. 3.)

Pursuant to Section 203(a) of the Emergency Price Control Act, 50 U. S. C. Appx. § 923(a), 56 Stat. 31, petitioners filed a verified joint protest against the said regulation on September 27, 1943. (R. 1-9.) They also requested an oral hearing, but this was denied by an order of the respondent dated October 29, 1943, whereby an opportunity was afforded petitioners to present further evidence in writing. (R. 10-11.) This was done by affidavit filed November 12, 1943. (R. 12-17.)

The respondent took no action upon the protest until February 2, 1944, when he entered an order denying it. (R. 18.) The opinion accompanying the order of denial was little more than a summary, or compilation of conclusions, based upon "evidence" previously and privately considered by the respondent, most of which was contrary to the sworn statements of petitioners and which they had had no opportunity to refute. (R. 19-29.)

On March 3, 1944, pursuant to Section 204(a) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(a), 56 Stat. 31, petitioners filed a complaint in the United States Emergency Court of Appeals. (R. 47-51.) That Court entered a judgment of dismissal on August 4, 1944. (R. 70.)

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(d), 56 Stat. 31. The complaint herein was dismissed by the Emergency Court on August 4, 1944. (R. 70.)

C

QUESTIONS PRESENTED

The primary questions presented are (1) whether the Price Administrator may establish an *average* price for California table grapes, without regard for varieties or brands, contrary to the statutory requirements (a) that any price established must reflect "*the highest*" price received by producers of the commodity from January 1 to September 15, 1942, seasonally adjusted, (b) that there may be no elimination or restriction of the use of brand names, and (c) that there may be no standardization of any commodity except under special circumstances not here present; (2) whether the Price Administrator may establish any maximum prices for table grapes in the absence of the determination and publication of certain data by the Secretary of Agriculture, as required by the statute as conditions precedent; and (3) whether the establishment (detrimental to petitioners) of a maximum price for California table grapes after sales and other related commitments have been made and shipments have actually begun, followed by unreasonably delayed action upon a protest filed against such price, constitutes a violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

D

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court of Appeals has decided a substantial question of federal law of general importance which has not been, but should be, settled by this Court.* Section 3 of the Emergency Price Control Act of 1942, as amended by Section 3 of the Stabilization Act, provides

that no maximum price shall be established for any agricultural commodity which does not reflect to producers thereof "*the higher*" of certain price standards "as determined and published by the Secretary of Agriculture, namely: (1) the *parity price*, or (2) the *highest price received by producers from January 1 to September 15, 1942*—each adjusted for grade, location, and seasonal differentials. Although the Secretary of Agriculture did not make such a determination and publication as to California table grapes, as required by the statute as conditions precedent to the establishment of maximum prices, the respondent proceeded to take an *average* 1942 season price for *all varieties*. The respondent thus erroneously assumed authority to regulate the prices of California table grapes and, having assumed it, construed the statute as permitting him to take an average price without regard for grades and varieties or for the highest price received by producers from January 1 to September 15, 1942. (The parties conceded that the parity price need not be considered for comparative purposes.) This construction of the Act was approved by the Emergency Court and, unless reversed by this Court, will constitute a precedent for the establishment of maximum prices for *all* agricultural commodities absolutely at variance with the will of Congress and to the detriment of all producers of the higher-grade products.

2. *The Emergency Court has sanctioned proceedings by the respondent which deprived petitioners of due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and as protected by this Court.* The respondent did not establish maximum prices for California table grapes until after the shipping season had started and the growers and shippers, including petitioners, had made their necessary commitments. Petitioners promptly filed a protest and requested oral hearing. Hear-

ing was denied and, after the shipping season had ended, the protest was also denied. The denial was based upon the respondent's own conclusions, and upon "evidence" previously and privately considered by the respondent, most of which was contrary to sworn statements presented by petitioners, and which they had had no opportunity to refute. Such "due process" prejudiced the petitioners both as to its time and method, and the approval thereof by the Emergency Court offends against that due process guaranteed by the Constitution.

WHEREFORE, petitioners pray that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, and that said judgment be reversed, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

ELIOT C. LOVETT,
Counsel for Petitioners,
729 Fifteenth Street,
Washington 5, D. C.

September 2, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners*,

vs.

CHESTER BOWLES, Price Administrator, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
OPINION BELOW

The opinion (R. 63-69) of the United States Emergency Court of Appeals was rendered on August 4, 1944, and is not yet reported.

II
JURISDICTION

The judgment of the Emergency Court was entered on August 4, 1944. (R. 70.) The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. § 924(d).

III
STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-4 herein) and it is incorporated here by reference.

IV
SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.

2. The Emergency Court erred in failing to hold that the respondent was without authority to establish maximum prices for California table grapes in the absence of the determination and publication of certain prices as required by the statute as conditions precedent.

3. The Emergency Court erred in holding (R. 64-65) that the *average* 1942 price received by California table grape growers for all varieties is the criterion in any event.

4. The Emergency Court erred in holding (R. 68) that the action of the respondent in fixing a uniform maximum price for all California table grapes, subject only to differentials for seasonal sales, was not arbitrary or capricious and that it did not bring about a change in any established business practice in the industry, and in failing to hold that such action was in violation of the statutory prohibition against the elimination or restriction of the use of brand names, and against the standardization of any commodity.

5. The Emergency Court erred in holding (R. 66) that the maximum prices established by the respondent are not below the minimum set by the statute.

6. The Emergency Court erred in holding (R. 68) that the provisions of the Emergency Price Control Act governing procedure are adequate to preserve the constitutional

guarantee of due process of law, and in failing to hold that the action taken by the respondent in this case offends against due process.

V
QUESTIONS PRESENTED

The questions presented are—

1. Whether the respondent may establish an *average* uniform price for California table grapes without regard for the statutory requirements (a) that any price established must reflect *"the higher"* of certain prices determined and published by the Secretary of Agriculture, (b) that there may be no elimination or restriction of the use of brand names, and (c) that there may be no standardization of any commodity except under special circumstances not here present.

2. Whether the respondent may, in fact, establish any maximum prices for California table grapes in the absence of the determination and publication of certain data by the Secretary of Agriculture as required by the statute as conditions precedent.

3. Whether the establishment of a maximum price for California table grapes after sales and other related commitments have been made and shipments have actually begun—all to the detriment of petitioners, followed by the denial of a protest filed against such price, which denial was delayed until after the shipping season had terminated and was based upon the respondent's own conclusions and upon "evidence" previously and privately considered by the respondent, mostly contrary to sworn statements presented by petitioners, offends against due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

VI

STATUTORY PROVISIONS INVOLVED

The only statutes involved are the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. Appx. §§901, et seq., and the Stabilization, or Inflation Control, Act of 1942, 56 Stat. 765, 50 U. S. C. Appx. §§961, et seq. The provisions thereof, insofar as pertinent to the questions here presented, follow:

Stabilization Act

"Sec. 3.[4] No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grades, location, and seasonal differentials) or, . . .

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), . . .;

. . ."

Emergency Price Control Act

"Sec. 2. . . .

"(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices or methods, or means or aids to

[4] Section 3 of the Stabilization Act of 1942 superseded paragraphs (a) and (c) of Section 3 of the Emergency Price Control Act upon the suspension of the latter by the President on October 3, 1942, by Executive Order No. 9250 (7 F. R. 7871) pursuant to authority conferred upon him by Section 2 of the Stabilization Act.

distribution, established in any industry, except to prevent circumvention or evasion of any regulation, *or changes in established rental practices*, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."[5]

"(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; . . . (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; . . ."[6]

VII

SUMMARY OF ARGUMENT

Point 1. The only purpose of this suit is to have the protested regulation declared invalid. The first test of invalidity is whether the regulation is in accordance with or in violation of the statute itself. Without resorting to the details of prices and mark-ups it is here shown to be violative of several of the statutory provisions.

Point 2. The *minimum maximum* price which the respondent may establish for any agricultural commodity must reflect the *parity price* or the *highest price* received by the producers thereof between January 1, and September 15, 1942, *whichever is the higher.* The "parity" and "highest" prices to be used are those "determined and published by the Secretary of Agriculture". Inasmuch as the maximum price to be established by the respondent

---

[5] Italicized matter added by Act of June 30, 1944 ("Stabilization Extension Act of 1944"), Public Law 383, 78th Congress.

[6] This subsection was added by the amendatory act of July 16, 1943, c. 241, §5(a), 57 Stat. 566.

must reflect the higher of these two prices, the failure of the Secretary to determine and publish either or both precludes the respondent from establishing any maximum. These conditions precedent not having been met herein, the respondent was without authority to establish the maximum prices in question.

Point 3. The parties conceded that the parity price need not be considered here for comparative purposes. Therefore, only the highest price received by the producers of California table grapes from January 1 to September 15, 1942, is material. However, no such price appears of record, and the respondent adopted, instead, a 1942 "season average price" for all varieties of California table grapes. Such a price cannot satisfy the statutory requirement of "the highest price", and its adoption renders invalid the maximum prices based thereon.

Point 4. Petitioners are growers and shippers of high-priced California table grapes, and one of them sells under a brand name which he has spent a considerable sum of money popularizing. By the action of the respondent in establishing an average price for *all* varieties he forces the higher-priced brands and grades to be sold at a lower-price level, thus effecting standardization to that extent. This compels the discontinuance of the use of the brand name or the deterioration thereof by the sale of a lower grade grape thereunder, with resulting loss to the owner; and in the case of *any* of the higher-priced varieties it forces the grower to take a loss. The regulation thus violates the statutory prohibition against the elimination or restriction of brand names and the standardization of a commodity.

Point 5. The establishment of a single price applicable to all varieties of California table grapes and based upon

a 1942 season average price not only tends to standardize the commodity as aforesaid but also disrupts the selling and shipping practices of the industry, which has always sold and shipped according to varieties, brands, and grades. It thus violates the statutory prohibition against the respondent's use of his powers to compel changes in business practices or in means or aids to distribution established in any industry.

Point 6. The action of the respondent in imposing maximum prices on California table grapes after the season was well under way, selling and delivery arrangements made, and shipments in progress, gave the petitioners no opportunity to adapt their operations to the lowered prices and changed practices; and the delays available to and utilized by the respondent postponed action on petitioners' protest until after the season had ended. This deprived petitioners of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

VIII

ARGUMENT

Point 1. The Fundamental Question as to the Validity of the Regulation Involved may be Determined by the Respondent's Fulfillment of the Statutory Requirements—not by any Monetary Standard.

The opinions of the respondent and of the Emergency Court appear to contrive to give the impression that the petitioners have not been financially injured, at least not of record, by the establishment of the maximum prices in question, and that, in any event, the prices are "generally fair and equitable." Such considerations are beside the point and merely serve to becloud the basic issue of law.

This is not a suit for damages. Indeed, damages may not be recovered regardless of their extent and of an ultimate

judicial decision adverse to the respondent. (A person need not even allege injury in order to qualify as a protestant of a regulation; he need only be "subject to" a provision thereof.[7])

This suit is for the only purpose permitted by the Emergency Price Control Act, namely, to determine whether or not the protested regulation is invalid.[8] Petitioners contend that the first test of invalidity is whether the regulation is in accordance with or in violation of the statute itself. (See *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 215, 49 L. ed. 449, 452; *Waite v. Macy*, 246 U. S. 606, 610, 62 L. ed. 892, 895; and *International Railway Co. v. Davidson*, 257 U. S. 506, 514, 66 L. ed. 341, 346.) The respondent may not substitute his whims for the will of Congress no matter how meritorious the results may be presumed or held to be.

If the regulation be found violative of any of the statutory provisions it must be declared invalid regardless of whether petitioners may be considered by the respondent, and also by the Emergency Court, to be the recipients, under the regulation, of at least the minimum return contemplated by Congress, or merely a return which the respondent and the Emergency Court consider generally fair and equitable.

Therefore, petitioners will not burden this Court with price and mark-up details.

---

[7] Section 203(a) of the Emergency Price Control Act provides that "any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision . . ."

[8] Section 204(a) of the Act provides for the filing of a complaint "praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part," after which the Emergency Court has "exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding."

Point 2. Respondent was without Authority to Establish Maximum Prices for California Table Grapes.

Section 3 of the Stabilization Act[9] was obviously to protect the producers of agricultural commodities from the establishment of maximum prices which might be too low to provide them a fair return. That return was not to be below a certain minimum as "determined and published by the Secretary of Agriculture." That minimum, in turn, was to be the "*parity price*," or the "*highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942*," as adjusted by the Secretary for "grade, location and seasonal differentials," whichever was "*the higher*." In other words, determination and publication by the Secretary of Agriculture were conditions precedent to action by the respondent.

Therefore, before the respondent could fix any maximum price for any agricultural commodity he had first to ascertain the parity price and also the highest price received by the producers thereof between January 1 and September 15, 1942, as determined and published by the Secretary of Agriculture. If the Secretary had not published any such prices for the commodity which the respondent desired to place under price control it is clear that those prices were required to be published "by the Secretary" before the respondent could proceed.

Under Section 2(a) of the Act the respondent is required to accompany each regulation by a "statement of the considerations involved" in the issuance thereof. This Court indicated its familiarity with that requirement in the case of *Yakus v. United States*, 321 U. S. 414, 426, 88 L. ed. 653, 661:

> "The standards prescribed by the present Act, with the aid of *the 'statement of considerations' required to*

[9] See page 12, supra.

> *be made by the Administrator, are sufficiently definite and precise* to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. . . ." (Emphasis supplied.)

The parties have conceded, as stated (R. 64) in the opinion of the Emergency Court, that the 1942 prices for table grapes exceeded their parity price, and so only the 1942 prices need be considered as far as this case is concerned. But there is nothing in the statement of considerations, or even in the entire record, to indicate specifically and definitely what the highest 1942 price was between January 1 and September 15, 1942, as required by the statute.[10]

The lower court refers (R. 64) to the fact that the "1942 prices upon which the Administrator constructed his maximum prices were published in a bulletin entitled 'Prices Received by Growers for Fruit and Nut Crops' (Nov. 1943)

---

[10] In the statement of considerations issued by the respondent in connection with the primary regulation to which the regulation here involved was an amendment, namely Maximum Price Regulation 426, specific reference was not made to a determination and publication by the Secretary of Agriculture, but it did state that the tables which were included "set forth the minimum requirements of Section 3 and the manner in which the prices established by the accompanying regulation for the basing points comply with these requirements." (R. 35.) Two tables followed covering the commodities involved, namely, lettuce and cabbage. As to lettuce there was given the "Parity price as of May 15, 1943," then the "Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted," followed by the "Season average price for 1942." (R. 35.) As to cabbage there were given the "Parity price as of May 15, 1943," and the "Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted." (R. 36.)

It should be noted that the Administrator took the "highest price," not the "season average", as the basis in each case. True, in the case of lettuce he made an adjustment to a lower price as permitted by Section 3 of the Stabilization Act "to correct gross inequities," but in the case of lettuce he adopted the "highest price between January 1, 1942, and September 15, 1942, seasonally adjusted." The "season average price" for lettuce was wholly ignored, and it was not even mentioned for cabbage. (R. 36-37.)

issued by the Bureau of Agricultural Economics of the Department of Agriculture." However, no such publication is identified in the statement of considerations, or even in the opinion (R. 19-29) accompanying the order (R. 18) denying the petitioners' protest. Certainly, no such bulletin, in whole or in part, appears in the present record, and it is not one of which judicial notice may be taken under the decisions of this Court. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100. (See footnote 21, page 34, post.)

It is submitted that in order to support the maximum prices established by the regulation the material parts of any pertinent determination and publication by the Secretary of Agriculture should have been incorporated in the statement of considerations so that all persons affected might be fully advised. Failing in that, they certainly should have been made a part of the evidence introduced by the respondent, and the petitioners should have been given adequate opportunity to examine and question them prior to the denial of their protest

The Emergency Court does not even refer to the highest price received in 1942, let alone the period from January 1 to September 15th, as required, for the various kinds of California table grapes, but only to the fact that, in the bulletin mentioned, "the growers of California table grapes in the year 1942 received an *average price* of $57.10 per ton."[11] (R. 64, emphasis supplied.)

The lower court seems content (R. 65) with its conclusion that the Secretary of Agriculture determined and published an *average* price. It thus approves the action of the respondent, as noted in the latter's statement of considerations, in using the "season average price in 1942 for California table grapes, for table use of all varieties", instead

[11] Cf. footnote 10, page 18, supra.

of "the highest price" received by the producers thereof between January 1 and September 15, 1942.

There having been no showing made of the determination of the minimum pursuant to the statutory requirement, it is submitted that the respondent had no authority to establish maximum prices for California table grapes.

Point 3. Even if the Respondent had the Authority to Establish Maximum Prices for California Table Grapes he had no Authority to Establish a Single Price Based on an Average 1942 Season Price for all Varieties.

In his statement of considerations the respondent states (R. 40):

> "The season average price in 1942 for California table grapes, for table use of all varieties, according to the War Food Administrator, was $57.10 per ton, at the first delivery point. . . ."

This is the nearest he comes to citing a "determination and publication by the Secretary of Agriculture". But, assuming that this reference is sufficient to indicate that the Secretary has determined and published the "highest price received" by California table grape producers between January 1 and September 15, 1942, adjusted for grade, location and seasonal differentials, the question still remains as to whether the adoption by the respondent of the "season average price in 1942 for California table grapes, for table use of all varieties" is a compliance with the statutory requirement that the maximum price established shall be the "highest price" received by the producers of the commodity during the designated 1942 period.

It might be quite diverting, and possibly the respondent may choose to engage in such diversion, although the bases therefor are lacking in the present record, to discuss how the "highest price" is or should be determined by the

Secretary of Agriculture, and how it should be seasonally adjusted. However, the "highest price" as determined by the Secretary is supposed already to have been adjusted as required by the statute, so the only problem here is to ascertain the "highest price" as determined and published by the Secretary.

Under this *Point 3* of petitioners' argument it is assumed that the necessary determination of the "highest price" has been made, and it may also be that he determined a "season average price" as indicated by the respondent. That is immaterial. The fact is that the respondent took a "season average" rather than the "highest" price. This is quite different from the procedure shown (R. 35) to have been followed in the case of lettuce, which is certainly just as much an agricultural commodity as table grapes. Although the statement of considerations (R. 32-38) covering lettuce did not specifically mention a determination and publication by the Secretary of Agriculture, there was included a table which purported to be in pursuance of the statute and which contains the following items (R. 35):

Parity price as of May 15, 1943	$1.72 per crate.
Highest price between January 1, 1942, and September 15, 1942, seasonally adjusted	$4.05 per crate.
Season average price for 1942	$2.55 per crate.

Of course, the first two items, namely, the "parity price", and the "highest price" during the period specified by the statute, are the only ones which are essential for the respondent's purpose under the law because his duty is to select "the higher" of those two. Nevertheless, the third item, namely, "season average price for 1942", is intensely interesting for the reason that it shows how great a difference there may be between a "season average", as taken by the respondent in the case at bar, and the "highest price" between January 1 and September 15, 1942, as re-

quired by the statute, but as ignored by the respondent in the instant proceeding.

The obvious question is: "Why did the respondent base his establishment of a maximum price for lettuce [12] on the 'highest price' during the designated 1942 period, and then take the 'season average' 1942 price, without even mentioning the 'highest price', when he established the maximum price for California table grapes?" (Maybe it was because the Secretary had not determined and published a "highest price", as required by the statute as conditions precedent. That possibility, or fact, was discussed under *Point 2,* supra.)

The tables appearing in the record herein (R. 15, 31) clearly indicate the wide range of prices [13] of California table grapes, depending upon varieties and the grades within the varieties. As the Emergency Court observed (R. 67-68), a given variety may not always enjoy the same relative position in the selling-price structure. This is readily understandable because of the seasonal difference in volume and quality due to climatic and other conditions.

When Congress inserted the provision regarding the highest price received by producers from January 1 to September 15, 1942, it obviously referred to each agricultural commodity which was to be placed under price control. The petitioners contend that in the case of California table grapes, where there is a wide range of prices among the various varieties, *each variety* must be treated as a *single com-*

---

[12] Although it be immaterial to the present discussion, it should be noted for the sake of accuracy that, in the case of lettuce, the Administrator adjusted the "highest price" to a lower price as permitted by Section 3 of the Stabilization Act in order "to correct gross inequities." (R. 36.)

[13] On November 2, 1942, the price range of California table grapes was from $1.90 per lug for Tokays to $4.15 for Ribiers. (R. 15.)

modity and a maximum price fixed therefor.[14] Petitioners further contend that, if the word "commodity" be held to comprehend all varieties of California table grapes within the legislative intendment, the respondent should adopt the "highest price" which was received by producers of the variety commanding the best price during the period from January 1 to September 15, 1942. This would take care of all varieties, including those which sold at an unusually low price at that time, and it would also serve to comply with the prohibition of Section 2(j) of the Emergency Price Control Act against standardization, as hereinafter discussed under *Point 4.*

Therefore, regardless of whether the "highest price" be taken for each variety of California table grapes, or for the highest-priced variety, or for all varieties considered as one commodity, it is clear that the "highest price", as such, must be taken and not the "season average price in 1942". The action of the respondent in taking the latter price was an obvious violation of the statutory requirement.

---

[14] The respondent rejects any method of pricing table grapes by varieties because of what he considers to be practical difficulties of enforcement. (R. 23, 25.) In his opinion (R. 23), he gives as a primary reason for a single price the fact that the average consumer cannot distinguish between different varieties of table grapes. However, this problem, if it be such, has always been present and there is no indication that it has been a real one. The consumer, dealing with responsible sellers, can and does buy table grapes with the same assurance as to grade and quality that he buys numerous other products. The ordinary consumer is unable to make fine distinctions as to varieties and grades of many products whether or not they are subject to price control. He must rely upon the integrity of the retailer. If the latter be dishonest, the chances are that he will eventually be caught, even though it may take someone other than a consumer to do it.—Certainly any impracticability in connection with the enforcement of ceilings for different varieties was not mentioned in the respondent's statement of considerations. (R. 39-41.) Apparently, it was an afterthought.

Point 4. The Establishment of a Single Maximum Price for California Table Grapes Based upon a Season Average for 1942 for all Varieties in Violative of the Statutory Prohibition Against the Elimination or Restriction of Brand Names and the Standardization of the Commodity.

Section 2(j) of the Emergency Price Control Act prohibits the elimination or restriction of the use of trade and brand names, and also the standardization of any commodity unless the Administrator shall first determine that no practicable alternative exists for securing effective price control thereof.

The fact is uncontradicted that petitioner Urick ships choice grapes under his brand name "Poinsettia"; that he has spent large sums of money in popularizing and promoting this name; that the grapes sold thereunder command a price far in excess of the average and cannot be sold at the maximum provided by the regulation without severe loss; and that if he should temporarily discontinue the use of his brand name or sell a poor quality of grapes thereunder he would destroy the value of the name. (R. 5.)

Petitioner Urick's position is not unique. Many growers and shippers have, by special and expensive methods of cultivation, developed highly specialized grades of table grapes which they ship under brand names at premium prices. (R. 4.)

The fact is also uncontradicted that petitioner Powers is a grower of several varieties of table grapes, including Emperors and Malagas; that under ordinary circumstances Emperors are one of the higher-priced table grapes, while Malagas are a medium-priced variety; that Emperors are produced at the rate of three to four tons per acre whereas the same acreage and conditions will produce five to six tons of Malagas; that the Emperor season is longer; that

it costs approximately 25% more to produce Emperors than it does Malagas; that there is a higher percentage of weather damage and crop failures in the case of Emperors; and that there must be, and normally are, price differences between the two varieties. (R. 3-4.)

It therefore follows that any single maximum price which is supposed to cover all varieties will not be sufficient to protect the growers of the higher-priced varieties unless it is relatively high—higher than an *average* price based upon 1942 sales of all varieties. To illustrate: if the growers of the cheaper varieties received $1 per unit in 1942, while the growers of the more expensive varieties received $3, creating an average price of $2, the establishment of that price as the maximum for all varieties would penalize the grower of the choice grapes.

Where the grower also has a brand name which he has spent time and money in establishing, as in the case of petitioner Urick's "Poinsettia", it is incumbent upon him to keep that name before the public in order not to diminish its value. However, he cannot do that without immediate financial loss unless he substitutes lower-priced grapes for sale under that name—grapes which he can afford to sell at the $2 uniform ceiling. However, as soon as he does this his brand name deteriorates in the public view and may ultimately be eliminated as a useful adjunct to his business.

Thus, whether the high-priced grapes are sold under a brand name like Poinsettia, or under a recognized variety name like Emperor, the effect of establishing an average price as a maximum is to standardize the commodity, at least as to the average and high-priced varieties. (It might be assumed that the producers of lower-priced varieties might benefit by being permitted to sell at the higher (ceiling) price, but such a situation would be controlled by sup-

ply and demand and the forces of competition, just as in the absence of any price control, when low-grade products *may* be sold at high prices.)

As heretofore noted, the Act prohibits not only the elimination or restriction of the use of brand names, but also the standardization of any commodity unless the respondent Administrator first determines that no practicable alternative exists for securing effective price control. The latter prohibition may well be considered the more important inasmuch as it may comprehend the former, so the question to consider is whether there has been a determination that no practicable alternative exists.

Reference has already been made (*Yakus* case, supra) to the importance which this Court attaches to the statement of considerations which the respondent is required to issue in connection with every regulation promulgated by him. It is, among other purposes, to enable the court to ascertain whether the Administrator has conformed to the standards prescribed by the Act.

An examination of the statement of considerations (R. 39-41) issued in connection with the regulation here involved quickly discloses that there was no determination by the respondent, as required by the statute, that there exists no practicable alternative to standardization of California table grape prices in order to secure effective price control thereof. There is merely the catch-all conclusion that "it is the judgment of the Price Administrator and the War Food Administrator that the maximum prices established by the accompanying amendment will reflect to growers prices which fully comply with the Emergency Price Control Act of 1942, as amended". (R. 41.) Certainly, such a statement does not meet the suggestion which may properly be inferred from the language used by this Court in the *Yakus* case, supra, that a sufficient disclosure must be made by the

respondent in his statement of considerations so that "the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting." (321 U. S. 423, 88 L. ed. 659.)

Furthermore, the establishment of a single maximum price based upon an average season price for all varieties is contrary to the recommendations of the California table grape industry. The opinion of the respondent accompanying his order denying the protest, and also the opinion of the Emergency Court in upholding the respondent in so doing, place considerable reliance upon a statement (R. 58-61) made by a committee selected by the California table grape growers. (R. 23, 67.) However, no reference was made to the industry in the statement of considerations.

It is illuminating to read the industry committee's observations *in addition* to those quoted (R. 67) by the Emergency Court. It objected to any price ceilings on California table grapes because, among other reasons, of the extremely wide range in values and the large number of varieties. However, if price ceilings were to be established the committee recommended one over-all ceiling for all varieties, "*with due allowance for the actual price ranges as they exist.*" Then it pointed out that "*any average price cannot possibly be construed as satisfying the provision of the Act requiring use of the highest price,* or for carrying out in any degree the intent of Congress."[15]

---

[15] The committee selected by the California table grape growers stated, inter alia (R. 59-61):

> "This committee is unalterably opposed to price ceilings on California table grapes because of the extreme wide range in values, the large number of varieties involved, the highly perishable nature of the commodity, the hazards of weather, the uncertainty of labor supply, and many other risks, all of which in themselves are too detailed to discuss and analyze in this general statement, . . .
>
> "Therefore, if price ceilings *are* established we recommend *one over-all ceiling* for *all* varieties of table grapes, *with due*

It would, therefore, appear that the establishment of a maximum price based upon an average season price is really contrary to the recommendations of industry. However, a more compelling factor invalidating such a maximum price is admittedly its violation of the statutory prohibition against the elimination or restriction of brand names and the standardization of a commodity.

Point 5. The Establishment of a Single Maximum Price for California Table Grapes Violates the Statute by Compelling Changes in the Business Practices Established in the Industry.

Section 2(h) of the original Price Control Act prohibits the respondent from using his powers "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry,

---

allowance for the actual price ranges as they exist. We recognize such an over-all price ceiling would have to be relatively high, but we are of the opinion that any price ceilings by varieties would be so complicated and so difficult of enforcement they would break down completely. . . .

". . . The Emergency Price Control Act of 1942, as amended, provides in Section 3, paragraph 2, that the highest price between January 1 and September 15, 1942, shall be one of the bases for determining the minimum grower price permitted under the Act. In their negotiations concerning proposed price ceilings for Bartlett pears, representatives of the Bartlett pear industry of the Pacific Coast were told by you that this provision of the Price Control Act is interpreted to permit the *season average price* for 1942 to be used as the highest price. Should your department propose a similar interpretation of the Act in the case of grapes for table use we point out once more that the official market news reports covering the 1942 sales of all table stock at all auctions shows a *daily average price range of from $1.72 per package to $4.12 per package for an average of $2.09 per package,* which we consider is ample *proof of the fact that any average price cannot possibly be construed as satisfying the provision of the Act requiring use of the highest price,* or for carrying out in any degree the intent of Congress."

except to prevent circumvention or evasion of any regulation". By the Act of June 30, 1944 (Stabilization Extension Act of 1944), this prohibition was clarified by inserting the requirement that such changes may only be compelled where they are "affirmatively found by the Administrator to be necessary" to prevent such circumvention or evasion.

California table grapes are normally shipped under established industry practices and sold by varieties and brands. The fact is uncontroverted that the many varieties sold are shipped under four general classifications: "United States Fancy", "United States No. 1", "United States No. 2", and "Unclassified". (R. 3-4.)

The petitioners show (R. 3) that there are eight major varieties regularly shipped from the San Joaquin Valley area and the respondent asserts (R. 22) that information has been compiled with respect to 30 varieties of California table grapes. Tables furnished by the petitioners (R. 14-15) and by the respondent (R. 30-31) show an appreciable movement of the eight important varieties, with a wide range of prices.

It is thus apparent that, from an industry standpoint, there has been no difficulty concerning the distinction between grades and varieties either for the purpose of shipment or sales. However, the respondent would disregard this established industry practice and method of distribution and sale by standardizing the various varieties and grades through the medium of a single average price covering all varieties. He does this with the solemn suggestion in his opinion (R. 23), but not in his statement of considerations, that separate prices for each variety "would lead to confusion and evasion of the regulation, with the likelihood that all varieties would tend to be sold at the price of the highest-priced variety". He thus substitutes his administrative judgment for an industry practice, which

has developed over a period of years, and artificially creates a condition under which there is no incentive on the part of the California growers of the higher-priced varieties and grades to ship their products.

Therefore, it is submitted that the action of the respondent in fixing a single maximum price not only violated the provisions of Section 2(j) of the Act prohibiting elimination or restriction of the use of brand names or the standardization of a commodity, but also violated Section 2(h), which prohibits changes in business practices and means of distribution established in any industry.

Point 6. The Procedure Followed by the Administrator in Issuing the Regulation Involved and in Acting upon the Protest Filed Against it Constituted a Violation of the Constitutional Guarantee of Due Process.

The question of due process under the Emergency Price Control Act was presented to this Court in *Yakus v. United States*, supra. However, there no proceedings were had before the Administrator. It was a criminal case, and the defendant did not question the regulation involved or the validity of the Act until he was charged with violation thereof. However, this Court examined the provisions of the statute and came to the conclusion that "the authorized procedure is *not incapable* of according the protection to petitioners' rights required by due process."[16] In other

[16] This Court stated (321 U. S. 434, 88 L. ed. 665):

"For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny such hearing

words, it was held that the statute itself was *capable* of affording due process, but the Court left open the question of whether the Administrator, in a particular proceeding brought in pursuance of the Act, failed in the performance of any duty imposed upon him, or denied such hearing as the Constitution prescribes. *Such a case is here presented.*

The case at bar was instituted by a protest pursuant to the statutory provision. This was done on September 27, 1943, well within the 60 days provided by the statute from the date the regulation was issued, August 19, 1943. (R. 1-9.) On the latter date the shipping of California table grapes was already in progress and the petitioners had made various commitments concerning the time and terms of sale and delivery of grapes, and arrangements for the purchase of materials and other facilities for the transportation, packing and shipment thereof. (R. 3.) As a matter of fact, the grape harvesting season begins in June and is concluded early in December (R. 58)—a fact which was well known to the respondent. However, no tenable reason, much less an apology, was given for delaying the imposition of a maximum price until two months after the harvest had actually begun, and for some time after shipping commitments had been made and actual shipping had commenced.[17]

---

as the Constitution prescribed. . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphases supplied.)

[17] No reason whatsoever is given in the statement of considerations. (R. 39-41.) However, in his opinion accompanying the order denying the protest the respondent states (R. 21):

"The Price Administrator is in full accord with Protestants' recommendation for early issuance of regulations governing maximum prices of seasonal commodities, and if it had been possible maximum prices for table grapes would have been issued prior to August 19, 1943. . . ."

This action of the respondent in selecting such an inopportune time for issuing maximum prices for California table grapes prejudiced petitioners and other growers and shippers thereof. Even though the respondent had acted "within a reasonable time" upon their protest, as required by the statute, they could not possibly have filed a complaint in Court and obtained a decision before the end of the shipping season. In other words, their entire business, which is dependent upon a relatively short seasonal operation, may be changed or destroyed completely by the action of the respondent, illegal though it may be, taken at a time when they are committed as to their disbursements but not safeguarded as to their receipts.

Although the respondent did act upon petitioners' protest on October 29th—more than 30 days after the filing thereof, but within 90 days from the issuance of the regulation, all that he did, as unfortunately permitted by the Act,[18] was to deny petitioners' request for an oral hearing and afford an opportunity (30 days) to present further evidence in affidavit form. (R. 10-11.) The petitioners followed the only procedure open to them—they filed an affidavit as promptly as possible, November 12, 1943. (R. 12-17.) This sort of delaying action on the part of the respondent may go on interminably unless checked by order of the Emergency

---

[18] Section 203(a) provides that—

". . . *Within a reasonable time* after the filing of any protest under this subsection, *but in no event more than thirty days after such filing or ninety days after the issuance of the regulations or order* . . . in respect of which the protest is filed, whichever occurs later, *the Administrator shall* either *grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith.* . . . (Emphasis supplied.—*Note:* The 90-day provision was eliminated by the Act of June 30, 1944.)

Court.[19] However, the delay necessarily occasioned in obtaining such an order (petition, answer, argument, and possible rehearing) minimizes any benefit which might be obtained by ultimate action of the respondent.

Probably the petitioners would have been more practical if they had recognized that, because of the inexcusably late imposition of maximum prices upon their products, together with the endless delays available to the respondent under the protest and review provisions of the Act, a protest would be a waste of time. But hope still springs eternal in the human breast and, too, the petitioners were convinced of the justice of their position and they also thought that, perhaps, the respondent would hasten action upon their protest under the circumstances and grant relief prior to the end of the season.

Furthermore, an average price structure for all varieties of table grapes, as here imposed, will continue invalid unless Congress amends the Act to conform to the respondent's methods, and the only apparent possibility of relief

---

[19] The original Emergency Price Control Act made no specific provision for shortening any unreasonable delay (beyond the statutory limit) on the part of the Administrator, but the Emergency Court held that it had power to issue an order in the nature of a writ of mandamus upon a proper showing. *Safeway Stores v. Brown*, 138 F. (2d) 278, certiorari denied 320 U. S. 797. By the amendatory Act of June 30, 1944, the following subsection was added to Section 203:

> "(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period."

is through a review by this Court.[20] Petitioners naturally desire to have such benefit as compliance with the statutory requirements may afford them because without it they, as producers of higher-priced table grapes, must suffer not only disruption in their established business practices but also immediate financial loss.

Although the inadequacy of respondent's statement of considerations, the delays occasioned by him and permitted by the Act, his opinion with its conclusions and references to matters not of record,[21] followed by the decision of the

---

[20] The respondent is still up to his old tricks. On August 2, 1944, he issued Amendment No. 46 (9 F. R. 9509) to Maximum Price Regulation No. 426, superseding the amendment here involved but retaining the objectionable and invalid *average price* basis and even reducing the return to producers. Significantly, this was also *issued after the season was well under way*, although in Amendment No. 50 (9 F. R. 10,192), issued August 18, 1944, he claimed that Amendment No. 46 was issued "on very short notice." He admitted that the prices which it established were "considerably lower than the going market prices," and he postponed to August 28th the effective date of the amendment under certain conditions.

[21] In the case of *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100, this Court stated:

> ". . . From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or *even government reports* are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, *withholding from the record the evidential facts* that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (Emphases supplied.)

Emergency Court long after the season terminated and even after another had begun, leave much to be desired in the way of due process, the primary complaint of petitioners concerns the date of the imposition of the maximum prices in the first place.

In other words, the lack of due process in this case stems from the respondent's failure to synchronize the establishment of maximum prices of California table grapes with the seasonal factors involved. Admittedly, as suggested by this Court in the *Yakus* case, supra, the respondent *might* have afforded due process. *But he did not.* He waited until the producers and shippers had made their seasonal arrangements for disposing of the table grape crop and then, while they were in the process of pursuing their usual methods of distribution, he imposed price ceilings. If this had been done reasonably in advance of the table grape season they could have made adjustments accordingly, or they could have filed a protest with more hope of relief before it was too late.

Here the respondent made a mockery of such due process as the Act afforded by issuing his regulation at a time when, as far as that season was concerned, it proved to be only an empty satisfaction to follow the procedural steps provided. The only benefit to accrue from a review by this Court and a declaration that the "season-average" single-price basis is in violation of the statute and renders the regulation invalid will be the effect which it may have upon the respondent in his future actions. Certainly petitioners may not recover from anyone such losses as they may have incurred as a result of their operation under the regulation during the 1943 season, regardless of the fact that the regulation may be declared wholly invalid.

However, it is submitted that such considerations only accentuate the need for procedural due process at the very

outset, and that the respondent's failure to accord it renders invalid the regulation in question.

IX

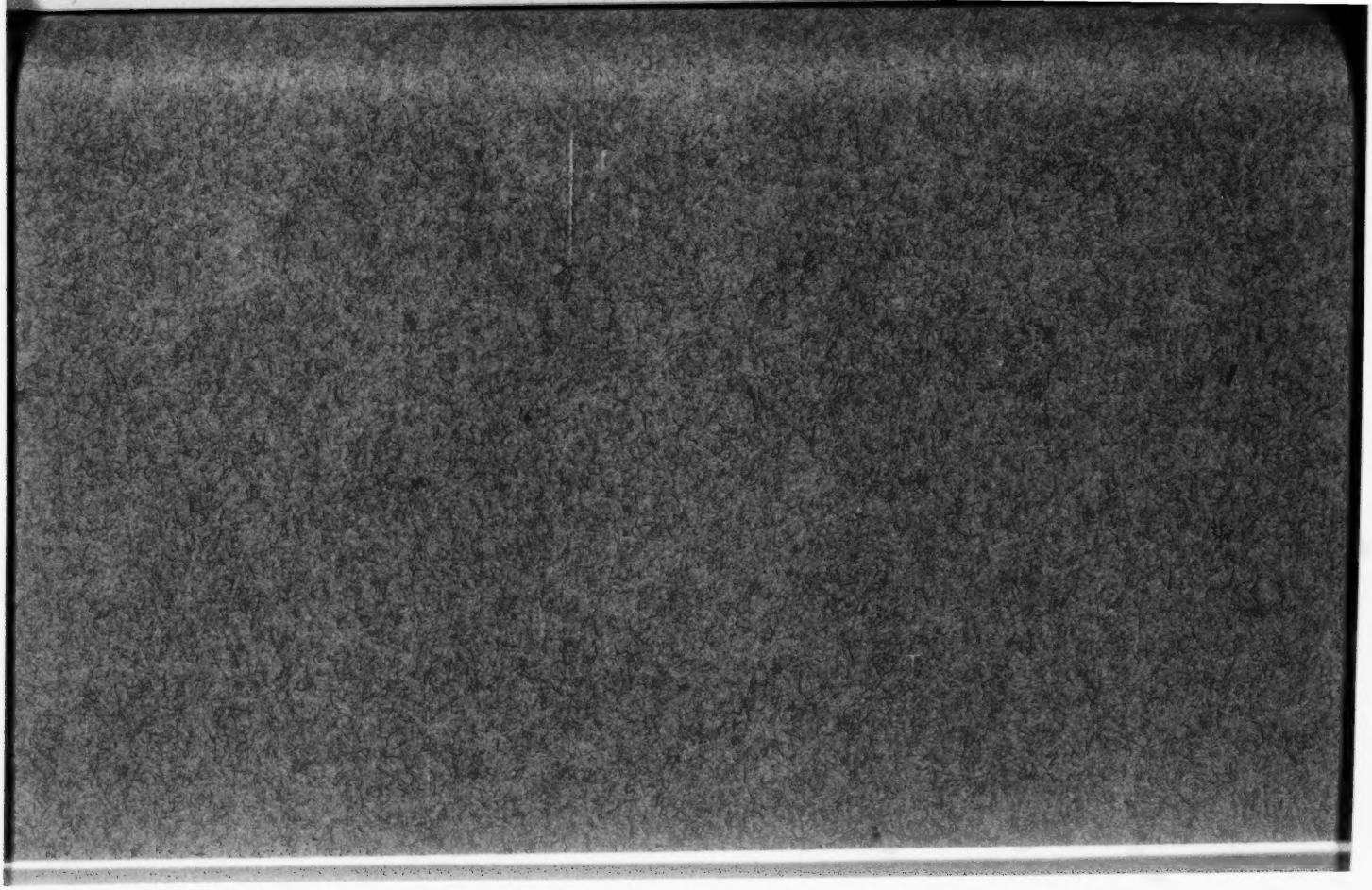
CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that both the substantive and procedural provisions of the Emergency Price Control Act, as amended, may be given the effect intended by Congress and required by the Constitution; and that to such end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

ELIOT C. LOVETT,
Counsel for Petitioners,
729 Fifteenth Street, N. W.,
Washington 5, D. C.

September 2, 1944.



INDEX

CITATIONS

611569—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 425

LUCIUS POWERS AND W. E. URICK, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 63–69) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 4, 1944 (R. 70). The petition for a writ of certiorari was filed September 2, 1944. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. III, Sec. 901

(herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C., Sec. 347).

QUESTIONS PRESENTED

(1) Whether establishment by the Price Administrator of a single maximum price for all table grapes, subject to seasonal variations, discriminated illegally against petitioners or required changes in established business practices in contravention of Section 2 (h) of the Emergency Price Control Act.

(2) Whether the maximum prices for table grapes violated the minimum price standards for agricultural commodities imposed by Section 3 of the Stabilization Act of 1942 (c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. III, Sec. 961).

(3) Whether the establishment of maximum prices for table grapes after the inception of the 1943 shipping season deprived petitioners of property without due process of law.

The petition also seeks to raise a number of questions which may not be urged here since they were not presented to the Price Administrator or to the Emergency Court of Appeals.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the Stabilization Act of 1942, as amended, appear in the Appendix, *infra,* pp. 19–30. The maximum

price regulation involved and the amendments thereto are printed in the Federal Register (8 F. R. 9546, 11589, 16519; 9 F. R. 9509).

STATEMENT

Maximum prices for table grapes were first established by the issuance on August 19, 1943, of Amendment No. 4 to Maximum Price Regulation No. 426. Petitioners filed a protest against Amendment No. 4 on September 27, 1943 (R. 1). Petitioners requested an opportunity to present further evidence, and the Price Administrator afforded them an opportunity to present in written form any further evidence that they might desire (R. 10–11). Additional evidence was filed by petitioners on November 12, 1943 (R. 12).

On December 6, 1943, the Price Administrator issued Amendment No. 14 to Maximum Price Regulation No. 426, which granted part of the relief requested by petitioners (R. 29, 42). On February 2, 1944, the protest was denied insofar as relief had not already been granted (R. 18, 19–31). The Price Administrator's opinion in part relied upon price data compiled by the Department of Agriculture not theretofore incorporated into the record[1] and for this reason,

[1] The Price Administrator's opinion incorporated into the record certain previously unpublished data of the Bureau of Agricultural Economics (R. 31), and took official notice of certain published market bulletins, including *Grapes, 1942* (Federal-State Market News Service) and *Agricultural*

the order of denial afforded petitioners the opportunity to apply for reconsideration of the decision within thirty days thereafter (R. 18, 29). Petitioners did not apply for reconsideration of the Price Administrator's decision, but on March 3, 1944, filed a complaint with the United States Emergency Court of Appeals (R. 47–51). The court rejected all of the objections then asserted by petitioners to the maximum prices in question and dismissed the complaint (R. 63–70).

ARGUMENT

We respectfully submit that the petition presents no ground warranting further review by this Court. No conflict is shown between the decision below and any decision of this Court or of any other court. Nor does the petition raise any important question of federal law which should be decided by this Court; the particular maximum prices involved have been attacked by no other protestants, and the contentions upon which the petitioners here rely have been advanced only in the instant proceeding. Moreover, we believe that the objections urged by petitioners are clearly without merit for the reasons which follow.

Prices (Bureau of Agricultural Economics) (R. 22, 27, 30) Although the published materials were not physically incorporated into the record, they were before the Emergency Court of Appeals by oral stipulation of the parties, and in addition are properly a subject of judicial notice. *Shapleigh* v. *Mier*, 299 U. S. 468.

I

THE ESTABLISHMENT OF A SINGLE MAXIMUM PRICE FOR TABLE GRAPES DOES NOT DISCRIMINATE AGAINST PETITIONERS OR VIOLATE SECTION 2 (h) OF THE EMERGENCY PRICE CONTROL ACT

The regulation to which petitioners object established a single maximum price applicable to all table grapes, subject to seasonal variations, but without differentiations for varieties, grades, or brands. In the protest petitioners contended that the regulation thereby discriminated against grapes of the Emperor variety and against the better grades and brands of table grapes (R. 5). It was also asserted that fixing such an undifferentiated maximum price contravened the prohibition of Section 2 (h) of the Act against compelling changes in established business practices (R. 4).

Petitioners suggest that it would be better not to "burden this Court with price and mark-up details" (Pet. 16). However, the abstract legal issues which petitioners pose may be evaluated only in the light of an examination of the maximum prices in question and their relationship to historic price levels.

The maximum price for table grapes which petitioners attacked was a f. o. b. shipping point price of $2.05 per 28-pound lug box, subject to seasonal increases to $2.30 on November 1 and to $2.60 on January 1 (R. 24). The maximum price of $2.05 per lug for early-season sales was far in excess of the unprecedented average grower

return for the 1942 season of $0.80 per lug ($57.10 per ton), the difference including an allowance of $0.37 per lug to reflect the normal price range above the average for sales of the better grades, varieties, and brands (R. 24, 64).[2]

The regulation was thus constructed in such a manner as to preclude hardship to producers of table grapes which in a normal market would have commanded prices higher than the average. That this is the fact is shown by conclusive evidence discussed in detail in the opinion of the court below (R. 66). Thus, petitioners urge that the establishment of a single maximum price discriminates against the Emperor variety of table grapes. It is illuminating to compare the early-season maximum price of $2.05 per lug with the following price range for Emperor grapes shipped in a corresponding period in preceding years:[3]

---

[2] The maximum price of $2.05 per lug consisted of the average grower return in 1942 of $0.80 ($57.10 per ton) plus $0.88 for pre-shipping expense and $0.37 to reflect the deviation above the average for sales of higher-priced grapes (R. 64). Evidence supplied by petitioners indicated that the allowance for pre-shipping expense may have been too ample (R. 15). *Prices Received by Growers for Fruit and Nut Crops* (Bureau of Agricultural Economics, U. S. Dept. of Ag., Nov. 1943), p. 24, shows that the average return to growers of California table grapes in 1942 of $57.10 per ton compared with $36.20 in 1941, $21.70 in 1940, and $18.60 in 1939. The appropriate parity price for grapes, published by the Secretary of Agriculture in *Agricultural Prices* (Bureau of Agricultural Economics, June 19, 1944) was $48.30 per ton.

[3] *Grapes, 1942* (Federal-State Market News Service), 15.

Year:	Price range per lug
1942	$1.50 –$1.80
1941	.95 – 1.05
1940	.62½ – .75

The maximum price of $2.05 applicable to all table grapes was thus sharply above even the high 1942 price for Emperors, and as the court below observed, "173⅓% greater than the highest reported 1940 price for Emperors" (R. 66).

It is true that establishing a single maximum price for all table grapes led to a higher level of maximum prices than would have been necessary if separate maximum prices could have been established for different varieties, grades, and brands. Prior to the issuance of the regulation, the Price Administrator gave consideration to the possibility of fixing separate maximum prices for different varieties of table grapes, but, upon the advice of the industry, rejected such a plan as wholly unworkable. Thus, the California table grape committee unanimously made the following recommendation:

> Therefore, if price ceilings *are* established we recommend *one over-all ceiling* for *all* varieties of table grapes, with due allowance for the actual price ranges as they exist. We recognize such an over-all price ceiling would have to be relatively high, but we are of the opinion that any price ceilings by varieties would be so complicated and so difficult of enforcement they would break down completely. Neither the Government nor our industry

can afford to have such an eventuality occur. (R. 60.)

It could hardly be reasonably urged that the Price Administrator was arbitrary or capricious in adopting this industry recommendation as a basis for the structure of the maximum price regulation.

The suggestion that separate maximum prices should have been established for the various varieties of table grapes must be premised upon the assumption that there is a reasonably stable historical price relationship between the different varieties which could be embodied in a regulatory structure. Petitioners, however, did not present any evidence of such price relationship. On the contrary, as the court below observed, the evidence of past prices of eight major varieties of table grapes incorporated into the record by the Price Administrator shows that Emperors, while commanding the second highest price in 1942, ranked third in 1938, fourth in 1936 and 1939, and fifth in 1937, 1940, and 1941 (R. 23, 30). As the court below recognized, in the light of such fluctuating price relationships in a normal market, the Price Administrator was fully justified in not attempting to establish a structure of separate maximum prices in terms of varieties. (R. 68.)

The protest alleged that hardship might result to shippers packing table grapes under special brand names, and the petition elaborates upon

these possibilities (Pet. 2–3). However, the court below found that "complainant Urick who made the specific charge that the Regulation unlawfully discriminates against the grapes which he sells under the brand name 'Poinsettia', has offered no evidence to establish this contention" (R. 68). As the court observed, such unproved allegations do not merit further consideration.

Petitioners further contend that a single maximum price for all table grapes is invalid as requiring changes in established business practices contrary to the prohibition of Section 2 (h) of the Act. As the court below found, this charge was wholly unsupported by facts. Petitioners have pointed to no prohibition in the regulation against the continuance of their customary business operations or, in fact, to any prohibition other than a limitation upon the prices which they may charge. Consequently, it is patent that there is no merit to petitioners' claim that the regulation contravenes the "business practices" provision of the Act. *Philadelphia Coke Co* v. *Bowles,* 139 F. (2d) 349 (Em. App. 1943).

For the first time in the petition it is urged that the regulation is invalid as an attempt to "standardize" table grapes or to eliminate or restrict the use of trade and brand names, in violation of Section 2 (j) of the Act (Pet. 24–28). However, these contentions, apart from their obvious lack of substance, cannot avail petitioners. The assertion of new objections at this stage of

the proceeding is foreclosed both by the explicit provisions of Section 204 (a) of the Emergency Price Control Act and by orderly procedure with respect to review in this Court. See *Marshall Field & Co.* v. *National Labor Relations Board* 318 U. S. 253.

II

THE MINIMUM PRICE STANDARDS FOR AGRICULTURAL COMMODITIES PROVIDED BY THE STABILIZATION ACT OF 1942 DID NOT PRECLUDE THE ESTABLISHMENT OF PRICE CONTROL OVER TABLE GRAPES OR OTHERWISE INVALIDATE THE REGULATION

The protest filed by petitioners with the Price Administrator contained the general allegation that the maximum price for table grapes was "below any price which could, in view of the evidence, have been fixed" pursuant to the provisions of the Stabilization Act of 1942, which imposed additional minimum price standards specially applicable to agricultural commodities (R. 3). The only evidence submitted in support of this allegation related to compliance with the requirement of Section 3 that maximum prices for agricultural commodities reflect "increased labor or other costs to the producers of such agricultural commodity." The opinion of the court below showed this contention to be without substance (R. 65–6), and it has now been abandoned by petitioners.

In the petition a new objection based upon the Stabilization Act of 1942 is for the first time asserted. It is now contended that alleged fail-

ure of the Secretary of Agriculture to determine and publish the "highest price" received between January 1 and September 15, 1942, by growers of table grapes precluded the Price Administrator from establishing any maximum prices for this commodity, regardless of the level at which the ceiling should be imposed (Pet. 17–20). This objection may not now be raised, since it was presented neither to the Price Administrator nor the Emergency Court of Appeals.

In any event, the contention is without merit. The language of the Stabilization Act provides only that certain price data, as determined and published by the Secretary of Agriculture, shall constitute a floor below which maximum prices may not be established. Petitioners refer to no statutory provision which lends support to the suggestion that any action by the Secretary of Agriculture other than the approval of maximum price regulations governing agricultural commodities expressly provided for in Section 3 (e) of the Emergency Price Control Act should constitute a condition precedent to the establishment of maximum prices.

Nor is there basis for the assertion that the Secretary of Agriculture failed to determine and publish the appropriate minimum price standards applicable to table grapes. The legislative history of the Stabilization Act of 1942 makes it clear that compliance with the minimum standards of "parity" and "prices received by * * * pro-

ducers" must be ascertained by reference to the long-established procedures for the determination and publication of such data in the bulletins of the Bureau of Agricultural Economics.[4] Such parity prices and prices received by producers for table grapes have been periodically determined and published by the Secretary of Agriculture. For most agricultural commodities, monthly average prices received by producers are determined and published. For some of the seasonal commodities, including grapes, the determination of prices received by producers has customarily taken the form of a season average price. That Congress intended that the minimum price standards should be based upon this settled administrative practice is demonstrated by the fact that tables of the proposed legal minimums which included such season average prices, and more particularly which included the season average price for grapes, were submitted to the Senate Banking and Currency Committee and formed the basis for discussions leading to passage of the Stabilization Act of 1942.[5]

Petitioners contend in the alternative that even if the Price Administrator had authority to establish maximum prices for table grapes the

[4] Hearings before the Senate Banking and Currency Committee on S. J. Res. 161 (77th Cong., 2d Sess., 1942), pp. 44–47, 57, 85–6, 142, 210, 217; 88 Cong. Rec. 7204, 7217, 7234, 7481.

[5] Hearings before the Senate Banking and Currency Committee, *supra*, p. 45.

maximum prices set forth in the Regulation are inconsistent with the "highest price" provision of Section 3 of the Stabilization Act of 1942 (Pet. 20–23). This contention fails for a number of reasons. In the first place, the Stabilization Act clearly requires the Price Administrator to conform to the standards "as determined and published by the Secretary of Agriculture," and petitioners have referred to no price determined by the Secretary which is inconsistent with the regulation. In fact, as has already been shown (note 2, p. 6, *supra*), the maximum prices in question far exceed both the parity and grower return prices which the Secretary of Agriculture has determined and published.

The lack of substance to petitioners' contention is further revealed by their concession that "there is nothing * * * in the entire record to indicate specifically and definitely what the highest 1942 price was between January 1 and September 15, 1942 * * *" (Pet. 18). Under Section 204 (b) of the Emergency Price Control Act, petitioners have the burden to "establish * * * that the regulation * * * is not in accordance with law * * *." Not only did petitioners offer no evidence to show that the maximum prices were invalid even under their construction of Section 3 of the Stabilization Act, but price data discussed by the court show the maximum price established by the regulation to

be sharply above the highest reported prices received in the statutory 1942 period (R. 65).

III

PETITIONERS HAVE NOT BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY PROCEDURAL ERRORS IN THE PROTEST PROCEEDING OR BECAUSE OF ESTABLISHMENT OF THE MAXIMUM PRICES AFTER THE INCEPTION OF THE 1943 SHIPPING SEASON

Petitioners' statement of facts criticises the proceedings before the Price Administrator on the ground that the Price Administrator's opinion in the protest proceeding was based upon evidence which petitioners had no opportunity to refute (Pet. 4). As has already been indicated, this assertion is contrary to the facts. Since the opinion relied in part on material not theretofore part of the protest record, the order accompanying this opinion afforded petitioners the opportunity to apply for reconsideration of the decision (R. 18, 29). Petitioners did not apply for reconsideration of the Price Administrator's decision, nor did they in the Emergency Court of Appeals assert that they had not been given an opportunity to rebut the evidence upon which the Price Administrator relied (R. 47–51). Petitioners' intimation that they were denied a full opportunity to substantiate their case or to meet the Price Administrator's evidence is thus wholly without foundation.

Petitioners also suggest that the Price Administrator delayed unduly in determining their pro-

test. This contention likewise is without substance. As petitioners now concede, if in the course of the protest proceedings they were of the opinion that the Price Administrator was unduly delaying action, they could have filed a petition for a writ of mandamus in the Emergency Court of Appeals to require the Price Administrator to expedite his determination (Pet. 33). Petitioners, having failed to avail themselves of this remedy, now have no standing to assert that illegal delay occurred in the course of the administrative proceedings.

Petitioners now rely principally upon the contention that the Price Administrator could not legally have imposed any maximum prices for the table grapes produced in the 1943 season since maximum prices were not announced in advance of the inception of that season. It could hardly be contended that alleged lateness in establishing maximum prices for the 1943 season rendered invalid the price-control program in its application to subsequent years. As to the 1943 season itself, petitioners concede that they "may not recover from anyone such losses as they may have incurred as a result of their operation under the regulation during the 1943 season, regardless of the fact that the regulation may be declared wholly invalid" (Pet. 35). Consequently, it does not appear that petitioners' objection to the date of establishing price control for the 1943 table-grape season now presents a justiciable contro-

versy meriting review in this Court. *California* v. *San Pablo & T. R. Co.,* 149 U. S. 308, 314.

Nor is there merit in petitioners' contention that the Price Administrator acted unreasonably with respect to the date of issuance of maximum prices for the 1943 table grape season. The reasons for the date of initial establishment of maximum prices for table grapes were set forth as follows in the Price Administrator's opinion:

> During the summer of 1943 the Office of Price Administration was attempting to meet the huge task of establishing enforceable dollars and cents maximum prices for fresh fruits and vegetables with all the speed that was consistent with the establishment of fair and workable regulations. Maximum prices for table grapes were established as soon as practicable, after extensive consultation with the industry and while the bulk of the grape crop was yet unsold. (R. 21.)

In the inception of any price control program, there is of course the certainty that some delay will occur before the validity of the regulation can be finally determined. This fact, however, was faced squarely by this Court in *Yakus* v. *United States,* 321 U. S. 414. In that case this Court determined that in view of the evils inherent in delayed or interrupted price control, the choice in favor of continued controls pending review was one fully within congressional power. The Court stated (p. 439):

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation.

As was pointed out by the court below, the essence of petitioners' argument is that provisions for interlocutory relief should have been made available with respect to seasonal commodities such as table grapes. Since this proceeding does not involve an application for interlocutory relief, this would hardly appear an appropriate proceeding to test that issue. Nor is there substance to the contention that special provisions for interlocutory relief should have been made available with respect to a commodity such as table grapes. Although the private interest in being promptly relieved of price control is heightened in the case of a seasonal commodity, the public interest in such a case is increased to an equal or greater degree, since interlocutory relief from price regulation of a seasonal commodity might permit the entire year's production to escape control. In any event, the contentions that interlocutory relief should have been available and that petitioners have been deprived of property without due process of law are foreclosed by the lack of merit to petitioners' objections to the

propriety of the maximum prices to which they have been subject.

CONCLUSION

The decision below is clearly correct, and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

OCTOBER 1944.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by c. 578, 56 Stat. 767, and by Pub. L. 383 (78th Cong., 2d Sess.) are as follows:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the

following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case

may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator.

* * * * *

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

* * * * *

(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are de-

scribed in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

* * * * *

SEC. 3 (e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

* * * * *

SEC. 203 (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Ad-

ministrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however,* That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpenas shall

issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant

to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and there-

upon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such

division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emer-

gency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Pertinent provisions of the Stabilization Act of 1942, c. 578, 56 Stat. 765, as amended by Pub. L. 383 (78th Cong., 2d Sess.) are as follows:

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control

Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President shall, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or

substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further,* That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

On and after the date of the enactment of this paragraph, it shall be unlawful to establish, or maintain, any maximum price for any agricultural commodity or any commodity processed or manufactured in whole or substantial part from any agricultural commodity which will reflect to the producers of such agricultural commodity a price below the highest applicable price standard (applied separately to each major item in the case of products made in whole or major part from cotton or cotton yarn) of this Act. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners*,

v.

CHESTER BOWLES, Price Administrator.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

PETITIONERS' REPLY BRIEF

ELIOT C. LOVETT,
Counsel for Petitioners,
729 Fifteenth Street, N. W.,
Washington 5, D. C.

October 18, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Table of Contents

Citations

* Refers to footnotes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 425

LUCIUS POWERS and W. E. URICK, *Petitioners*,

v.

CHESTER BOWLES, Price Administrator.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

---

PETITIONERS' REPLY BRIEF

A. The Respondent's Failure to Comply with the Statutory Requirements may not be Ignored or Excused.

Petitioners were, and still are, of the opinion that the record in this case presents certain fundamental issues which are in no way dependent upon details of actual prices and mark-ups. However, the respondent, in his opposition brief (p. 5), asserts that the legal issues "may be evaluated

only in the light of an examination of the maximum prices in question and their relationship to historic price levels." *He then injects prices as an excuse for his failure to comply with the statute.* He does this by submitting the price range for Emperor grapes—the variety grown by petitioner Powers. He notes (Brief, 7) that the maximum price of $2.05, applicable to all table grapes under the regulation in question, was "sharply above even the high 1942 price for Emperors", that price being quoted as ranging from $1.50 to $1.80 per 28-pound lug or package.

Thus, the respondent would minimize the importance of, or entirely circumvent, the statutory requirement that the Secretary of Agriculture must determine and publish the highest price received by producers of California table grapes between January 1 and September 15, 1942. He does this by asserting that the maximum price established by the regulation is, after all, higher than the highest price received for Emperor grapes in 1942. In other words, he would have the Court believe that the producers are not injured by his failure to abide by the mandate of the statute. *He does not contend that there was even an attempt to comply with the statutory requirement of a publication and determination of the "highest price" and of the establishment of a maximum price based upon that as a minimum.* Even though this sort of argument were sound it would fail in the light of the true facts.

The only place that a price range of $1.50 to $1.80 for Emperor grapes appears *in the record* is in the opinion of the Emergency Court. (R. 66.) It is not even disclosed where the Court obtained the figures but, from respondent's brief (p. 6n), it appears that they were obtained from page 15 of a publication known as "Grapes, 1942," published by the Federal-State Market News Service. This publication is a type of marketing service giving price information and trade news concerning the grape industry. The particular issue to which reference is made covers *29 mimeographed letter-size pages*, no portion of which is a part of the rec-

ord in this case. Therefore, it would appear that the Emergency Court has taken judicial notice of only so much of the publication as suited its purpose.

This reliance by the lower court, and now by the respondent in his opposition brief, upon a minute excerpt from a publication not of record and not enjoying the dignity of a document which might be judicially noticed[1] shows the wisdom of the statement of this Court in the case of the *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 1100, quoted in petitioners' brief (p. 34n). The practice is there decried of referring to "price lists or trade journals or even government reports" without putting them in evidence so that there may be "an opportunity in connection with a judicial review of the decision to challenge the deductions made from them."

If the said publication were in evidence in this case it would be shown that the $1.50 to $1.80 price range related to U. S. #1 Emperor grapes, which are actually of second grade, instead of the standard grade which is known as "United States Fancy". This grade would be seen ("Grapes", p. 19) to have sold at a price range of between $1.93 and $3.20, the average for more than 660,000 packages being $2.81. Inasmuch as this price includes 60¢ for refrigeration and freight the f.o.b. price would be $2.21. But this *average* is considerably higher than the $1.80 *high* price for Emperors used by the lower court and cited by the respondent.

[1] The respondent cites *Shapleigh v. Mier*, 299 U. S. 468, in an apparent effort to support the action of the lower court in taking judicial notice of certain material not of record, notably data contained in the above-mentioned publication "Grapes, 1942". (Opposition Brief, p. 4n.) That case involved judicial notice of the land laws of Mexico and only a general statement appears (p. 475) regarding such notice of "an event or a custom or a law of some other government". But for a pertinent and much fuller discussion of the subject of judicial notice, and one that does not support the respondent's contention, see the later case of *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292, 301-303, 81 L. ed. 1093, 1100-1101.

It would also be seen ("Grapes", p. 18) that for a period of 13 weeks from June 14 to September 12, 1942, the auction sales of *all varieties* of California table grapes in eastern cities enjoyed a weighted average weekly price range of from $2.04 to $5.20, resulting in a simple average of $3.44. Inasmuch as this figure includes 60¢ per package for refrigeration and freight, the f.o.b. price would be $2.84, which is a great deal higher than the $2.05 ceiling established by the respondent for all varieties.

Petitioners call attention to the fact that, although they personally deal only in Emperors and other choice varieties of table grapes, the regulation sets one average price for all varieties and grades. The regulation thus affects all members of the California table grape industry, a substantial number of whom produce top grade ("United States Fancy") grapes for table use.

Petitioners do not make the foregoing references to the publication "Grapes" with any suggestion that it is, or should become, a part of the record herein. They merely do so to show the injustice of permitting reference to a market report or a trade journal, no portion of which is properly before the Court. These references also emphasize the propriety of petitioners' contention that the legal issues involved may be settled without regard for price or mark-up details. The prices mentioned[2] were not determined and published by the Secretary of Agriculture and so may not be used for the establishment of maximum prices under the Price Control Act, but if they were to be used, as contended by the lower court and the respondent, the true figures should be quoted and the manifest unfairness of the $2.05 price he made apparent.

The respondent complains (Brief, 11): "Petitioners refer to no statutory provision which lends support to the suggestion that any action by the Secretary of Agriculture

---

[2] It should be observed that the figures quoted are for 1942 and that, according to allegations in the present record (R. 6), labor costs have since increased approximately 60%.

other than the approval of maximum price regulations governing agricultural commodities expressly provided for in Section 3(e) of the Emergency Price Control Act should constitute a condition precedent to the establishment of maximum prices." Such an assertion involves a total disregard for the statutory requirement of Section 3 of the Stabilization Act (Petition, 12; Opposition Brief, 28-29) requiring that no maximum prices shall be established for agricultural commodities below a price which will reflect to producers "the higher" of certain prices "as determined and published by the Secretary of Agriculture". The mere fact that the Secretary may have approved certain maximum prices as required by Section 3(e) of the Price Control Act (Opposition Brief, 22) does not set aside[3] the statutory requirement of prior determination and publication of certain prices, nor does it prove that the maximum prices established are not below the higher of such pertinent prices as may have been determined and published.

The respondent further seeks to excuse the failure of the Secretary of Agriculture to publish and determine the required prices in this case, and also his own disregard for the requirement, by explaining (Brief, 12) that the prices for table grapes "have been periodically determined and published by the Secretary of Agriculture", but that "For most agricultural commodities *monthly average* prices received by producers are determined and published", and that "For some of the seasonal commodities,

---

[3] As stated by this Court in the famous Arlington case, *United States v. Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 182:

> "*No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity.* All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> "It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." (Emphasis supplied.)

including grapes, the determination of prices received by producers has *customarily* taken the form of a *season average* price." He then alleges that Congress intended that the price standards prescribed should be based upon "this settled administrative practice" because certain tables setting forth the "season average price" were submitted to the Senate Committee during the discussions leading to the passage of the Stabilization Act. Such assertions answer themselves. It should not be necessary to point out that Congress did not use the word "average" but, instead, provided that the minimum price should be "the higher of the following prices," including "The highest price received" by the producers of the regulated agricultural commodities between January 1 and September 15, 1942.

The respondent then seeks to answer petitioners' contention (Petition, 20-23) that even if the respondent had the authority to establish maximum prices for California table grapes (through the determination and publication of the required prices by the Secretary of Agriculture) he had no authority to establish a single price based on an *average 1942 season price for all varieties*. He claims that this alternative contention fails for a number of reasons, all of which, to use respondent's pet phrase, "lack substance". In fact, they might be regarded as frivolous.

"In the first place," says the respondent, "petitioners have referred to no price determined by the Secretary which is inconsistent with the regulation." (Opposition Brief, 13.) Obviously, this is not the duty of the petitioners. The question is not whether *any* price which the Secretary may have determined is *in*consistent with the regulation, but it is a question of whether the respondent based his regulation upon *the higher* of certain prices determined by the Secretary. The ascertainment of such prices is the initial duty of the respondent. It is an affirmative duty; it obviously may not be escaped by shifting it to the petitioners as a negative duty.

The respondent next refers (Brief, 13) to petitioners' "concession" that the record does not disclose the

highest table grape price between January 1 and September 15, 1942, and he follows with the statement that under Section 204(b) of the Price Control Act petitioners have the burden of establishing that the regulation is not in accordance with law. This is merely another case of where the respondent endeavors to escape the responsibility of establishing authority for his own act.

The statute clearly states that "No maximum price shall be established or maintained" except under the conditions outlined. Thus, it was the respondent's duty to see that the conditions were fulfilled before he attempted to establish the maximum prices in question. He recognized this duty in the case of lettuce and cabbage. (R. 35-36; Petition, 18n, 21-22.) For both products he specifically cited the parity price and also the "highest price" between January 1 and September 15, 1942. The fact that he did not do so in the case of California table grapes can lead to but one conclusion—either the "highest price" had not been determined, or *it was higher than the respondent desired as a minimum for his maximum prices.*

Certainly the petitioners could not know the "highest price" as determined by the Secretary of Agriculture *if such a price had not been published.* They knew that the highest price, or even the season average price, was higher than the $2.05 maximum imposed by the respondent, but their knowledge was not based upon any determination and publication by the Secretary of Agriculture. *If* the figures appearing in the aforementioned publication "Grapes, 1942," were to be considered a fulfillment of the statutory condition, and *if* those figures were, *in their entirety*, a part of this record, or *if* the said publication were a proper subject for judicial notice, it would appear conclusively that the maximum price established by the respondent fell far short of complying with the statutory requirement as to the minimum which might be permitted.

B. The Authority of the Respondent is Properly in Issue.

The authority to issue a regulation may not be conferred upon the respondent either by waiver or by the consent of the parties. The inherent authority of the respondent is essential as a foundation for any action based thereon and without which such action must be considered a nullity from its inception. Even as a court must depend upon the Constitution or upon a statute for its jurisdiction, which cannot be conferred or enlarged by any other means and may be questioned at any time by the parties or by the court itself, so the authority of the respondent herein to issue a pa icular regulation must depend upon the Emergency Price Control Act, as amended by the Stabilization Act. If it be not within the limits therein prescribed, any action presumably grounded thereon must fail regardless of whether objection was specifically made thereto in a protest filed with the Administrator, or even in a complaint presented to the Emergency Court of Appeals.

The duty of the respondent and the conditions under which he may issue a regulation such as that here involved are clearly apparent in the statute itself. The fact that the conditions were not fulfilled by which the necessary authority would have been conferred upon him to issue the regulation in question is evidenced by the record. The respondent's claim that he need not comply with the statutory requirements as long as the Secretary of Agriculture approves the regulation in its final form presents an issue of law. This is squarely presented to this Court by the Petition herein (p. 5).

Under Section 204(d) of the Price Control Act judgments of the Emergency Court are made subject to review by this Court in the same manner as a judgment of a Circuit Court of Appeals as provided in Section 240 of the Judicial Code, as amended (28 U. S. C. § 347). That Section grants to this Court the same right of review as if the case were brought here "by *unrestricted* writ of error or appeal." Thus it has been held that this Court, on certiorari, must

determine whether the lower court had *jurisdiction* although that question was *not raised by counsel in either court. Shanferoke Coal & Supply Corporation v. Westchester Service Corporation*, 293 U. S. 449, 451, 79 L. ed. 583, 586.

Therefore, the issue of the respondent's jurisdiction or authority to promulgate the regulation in question is properly before this Court.

C. This Case Presents a Justiciable Controversy.

The petitioners frankly admit (Petition, 35) that the only real benefit which they and other members of the California table grape industry will derive from a declaration by this Court that the "season-average" single-price basis is in violation of the statute will be the effect which it will have in preventing the respondent from adhering to and continuing such an invalid basis. This is because there is no provision of law whereby petitioners may recover such losses as they have already incurred as a result of their operations under the regulation during the 1943-1944 season, even though the regulation may be declared wholly invalid. "Consequently," the respondent observes (Brief, 15-16), "it does not appear that petitioners' objection to the date of establishing price control for the 1943 table-grape season now presents a justiciable controversy meriting review in this Court."

In support of his contention, which is directed only to the due process issue based upon the establishment of price control after the 1943 season was well under way, the respondent cites the decision of this Court in *State of California v. San Pablo & Tulare Railroad Company* (1893), 149 U. S. 308, 314, 37 L. ed. 747, 748. That was a suit to recover taxes assessed by the State. When the case was called for argument it appeared that the cause of action had ceased to exist because of the payment of the taxes in controversy. This Court said that it was not empowered "to decide moot questions or abstract propositions, or to de-

clare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." Obviously, this ruling does not bar the review of the issues here presented; they continue to exist and will probably so continue to a greater or less degree as long as there is price control of agricultural commodities, or until they are resolved in favor of petitioners' contentions.

Petitioners have already called attention (Petition, 34n) to the fact that the regulation in question has not only continued in theory, but was even made more objectionable by an amendment which retained the season-average single-price basis and even reduced the already inadequate return to producers. It was also issued after the season was well under way, as in the case of the regulation which it superseded.

It should be parenthetically noted that the objectionable regulation has been temporarily suspended or revoked by Amendment No. 61 (9 F. R. 12,341) to Maximum Price Regulation 426, which amendment was issued October 9, 1944, and removed table grapes from price control. The reasons given in the statement of considerations involved are significant:

> ". . . This is primarily due to the inability of the Price Administrator to establish maximum prices for juice grapes for shipment. The Economic Stabilization Director has directed the Price Administrator not to establish ceiling prices for juice grapes, *because it is too late in the season, and because to do so would penalize late shippers and growers who have not already disposed of their grapes.*
>
> "The War Food Administration's raisin program has caused an abnormal demand for all grapes, including table grapes, for commercial wine-making. In the absence of ceilings on juice grapes for shipment, prices for all grapes to wineries have risen greatly. This has caused a marked diversion of table grapes away from sales for table use, and has invited those growers to bypass their shippers to sell to the wineries direct. In

addition, the return to growers of juice grapes has been much greater than the return to growers selling to the fresh market, due to the ceiling on the latter sales.

"Inasmuch as there are to be *no ceilings on juice grapes* for shipment, the conclusion is necessary that *maintenance of ceilings on table grapes for table use is discriminatory and inequitable.* . . ." (Emphases supplied.)

It thus appears that the removal of table grapes from price control was not due to any conviction on the part of the respondent that the objectionable season-average single-price basis should be discontinued. Instead it was due to the decision of the Economic Stabilization Director that it was too late in the season to establish ceiling prices for *juice* grapes because to do so would penalize late growers and shippers who had not already disposed of their crops. (Why such late imposition of ceiling prices was not held likewise to penalize table grape producers does not appear.) Therefore, only because the absence of ceilings on juice grapes caused a diversion of table grapes to the wineries, due to the high prices there obtainable as compared with the low ceiling on table grapes, were the latter removed from price control.

It is evident, and petitioners are convinced, that the objectionable regulation, with its invalid basis, will be reinstated, in effect, in time to control table grapes harvested in 1945 unless such action is discouraged by this Court. Indeed, there is nothing to prevent the reinstatement or reissuance of the objectionable regulation at any time—just as the respondent's fancy may dictate. Therefore, if the respondent's protested theory and practice be not now declared invalid it will mean that they may not again be brought into question until the regulation is reinstated or reissued, or its objectionable price basis continued in some other form. Then would follow the inevitable administrative delays culminating in denial of the protest as before,

and then appeal to the courts, accompanied by respondent's contention that the case is moot because the season is over or because he may have suspended the regulation after the damage, or much of it, has been done.

Certainly, if the right of a producer of a seasonal agricultural commodity to contest a regulation, through a review by this Court, may be removed either by the delays in the procedure provided or by the simple expedient of temporarily suspending or revoking the regulation, the statutory right of review becomes a mockery, and the control of an industry is made subject to the whims of an administrative officer of the Government.

Petitioners contend, therefore, that the case presents a justiciable controversy notwithstanding the time which has elapsed from delays over which they had no control, because the fundamental objection, namely, the authority of the respondent to establish a maximum price according to a basis different from, and less favorable than, the basis provided by the statute, is an objection which will continue until affirmatively met by the respondent or sustained by this Court, and also because a contrary contention would, for all practical purposes, invalidate the right of review prescribed by Congress.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIOT C. LOVETT,
Counsel for Petitioners,
729 Fifteenth Street, N. W.,
Washington 5, D. C.

October 18, 1944.